IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 29TH MAY 2007 / 8TH JYAISHTA 1929
CRL.A.No. 773 of 1999()

ST.20/1997 of ADDL. CHIEF JUDICIAL MAGISTRATE COURT, THIRUVANANTHAPURAM

APPELLANT: COMPLAINANT:

R.K.SATHEESH KUMAR, 'DEEPAS', VAZHAYILA, KUDAPPANAKUNNU P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.K.T.SHYAMKUMAR

RESPONDENT: ACCUSED & STATE:
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1. S.MANIYAN, RECORD KEEPER, STATE BANK OF TRAVANCORE, KILIMANOOR, THIRUVANANTHAPURAM.

2. STATE-REPRESENTED BY PUBLIC PROSECUTOR, ADVOCATE GENERAL OFFICE, ERNAKULAM

BY PUBLIC PROSECUTOR SRI.P.RAVINDRA BABU FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl.A. No. 773 of 1999

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Dated this the 29th day of May, 2007

JUDGMENT

The appeal is filed by the complainant against the acquittal order passed in C.C.No. 25/1997 on the file of the Addl. Chief Judicial Magistrate, Thiruvananthapuram. The learned counsel for the appellant submits that the case was posted to 9-6-1999 for hearing, but in an inadvertent mistake on the part of the Clerk of his counsel, the date of next posting was noted as 16-6-1999. It is also submitted that on 9-6-1999 when the case was called, neither the appellant nor his counsel was present and hence the trial court acquitted the 1st respondent under section 256 Cr.P.C.

2. It is not discernible from the order that personal attendance of the appellant is necessary on that day. As per a decision reported in Associated Cements Co. Ltd. V. Keshwanand (1998(1) KLT 179 (S.C.), the power under section 256 can be exercised by the court only in exceptional circumstances. In the above decision in paragraph 17 the Apex Court held as follows:-

"17. Reading the section in its entirety would reveal

> that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

Apart from the above, the order under challenge is not in accordance with the principles laid down by this Court in decisions reported in Don Bosco V. Partech Computers Ltd. (2005(2) KLT 1003) and G.F.S. Chits & Loans (P) Ltd. V. Rajesh (2006(3) KLT 825). In Don Bosco V. Partech Comp. (Supra) this Court held that "**the Magistrate did not apply his judicial discretion with the required caution, while dismissing the complaint and acquitting the accused".** In G.F.S.Chits & Loans (P) Ltd. V. Rajesh (Supra) this Court held that the courts should also bear-in-mind that

unmerited, thoughtless disposal gives wrong signal to the society, staking even public confidence in the system of administration of justice.

4. In the above circumstances, this Court is of the view that the order under challenge is liable to be set aside and the matter has to be remitted to the trial court for fresh consideration. Ordered accordingly. The trial court is directed to consider the matter afresh from the stage at which the order impugned has been passed.

The appeal is allowed as above.

The parties shall appear before the court below on 23-7-2007

The records of the case shall be forwarded to the trial court forthwith.

K. Thankappan,
Judge.

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It is relelvant to note that only because of the absence of the appellant, the 1st rspondent is dragged to this Court. Hence, it is only proper for this Court to allow a reasonable costs to the 1st respondent. Therefore, the appellant is directed to deposit before the court below an amount of Rs.2,000/- on or before the date of posting of the case. If the amount is deposited, the 1st respondent is permitted to withdraw the same.

K. Thankappan,J.

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Judgment
29-5-2007